Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-47
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, and 98-141

COMMENTS OF XO COMMUNICATIONS, INC.

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Pursuant to the Notice of Proposed Rulemaking ("NPRM") adopted by the Federal Communications Commission (the "Commission") on November 8, 2001, and released by the Commission on November 19, 2001,[1] XO Communications, Inc. ("XO") hereby submits its initial comments in the above-captioned proceeding.

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[1] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al*., Notice of Proposed Rulemaking, CC Docket No. 01-318, FCC 01-331 (rel. Nov. 19, 2001) (*UNE Measurements and Standards Notice*).

On December 7, 2001, the Commission granted an extension with respect to the comments deadline in this proceeding, establishing a comments deadline of January 22, 2002, and a reply comments deadline of February 12, 2002. *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al*., Order, CC Docket No. 01-318, DA 01-2859 (rel. Dec. 7, 2001).

I. INTRODUCTION AND SUMMARY

XO supports fully the efforts of the Commission to adopt a national list of performance measurements, standards and reporting requirements for evaluating incumbent local exchange carrier ("ILEC") performance in the ordering, provisioning and maintenance of facilities on a wholesale basis to competing carriers, including competitive local exchange carriers ("CLECs"). Specifically, XO supports the performance measurements and standards proposed in this proceeding by WorldCom, Inc. (the "WorldCom Measures").[2]

Several states have adopted, or are in the process of adopting, performance measurements, standards and reporting requirements for unbundled network elements ("UNEs"). Their work has been extremely important in generating the performance proposals included in the parties' comments in this proceeding. The Commission's efforts to establish performance measurements and standards should not, however, supersede the previous work and rules of the states. The Commission's rules developed in this proceeding should build on the states' efforts and set a nationwide floor for ILEC UNE performance measurements, standards and reporting requirements. However, state commissions should remain free to adopt the Commission's rules *in toto* or to develop more stringent requirements. In any event, the rules that result from this proceeding should represent the minimum baseline standards required of ILECs across the nation.

It is vital that the Commission develop quickly a national list of minimum requirements. While several states have developed similar measurements and standards, in some of those states, the adopted rules do not apply to all ILECs operating within that state. For example, the

[2] XO's support for the WorldCom Measures is limited to measurements and standards that impact UNE services and facilities utilized by facilities-based competitive carriers, including UNE loops, multiplexing and transport.

UNE performance rules implemented in Texas apply only to Southwestern Bell.[3] The rules, however, adopted in Texas leave the CLECs with dissimilar UNE performance measurements, standards and enforcement recourse with regard to Verizon in Texas.[4] A national list of minimum UNE performance measurements and standards and corresponding reporting requirements will provide important certainty to CLECs regarding the ordering, provisioning and maintenance obligations of the ILECs and encourage the growth of competition in the local telecommunications market. Such growth will ultimately benefit consumers through lower prices, better customer service and greater choice in telecommunications services.

As the sixth anniversary of the Telecommunications Act of 1996 (the "Act") approaches, the telecommunications industry has witnessed numerous Commission efforts to encourage the development of competition in the local telecommunications marketplace. One such example is the Commission's adoption of a national list of required UNEs.[5] With a national list of required UNEs in place for over two years, the time is now right to create a corresponding list of measurements and standards to ensure that ILECs meet their UNE performance obligations in a

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[3] *See Texas Performance Remedy Plan and Performance Measurements, Attachment 17 to Texas 271 Agreement (Version 2.0)* (Aug. 2001).

[4] Although Verizon must meet certain UNE performance measurements and standards under the Commission's order approving the Bell Atlantic-NYNEX and Bell Atlantic-GTE mergers, those merger conditions have expired in certain states or are set to expire in the near future. *See Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, Appendix D, Carrier-to-Carrier Performance Plan, 15 FCC Rcd 14032, (2000) (*Bell Atlantic/GTE Merger Order*). Despite the expiration or impending expiration of the UNE performance rules under the *Bell Atlantic/GTE Merger Order*, CLECs need the protection of continued UNE performance measurements, standards and reporting requirements applicable to all ILECs, in order to combat the ILECs' anticompetitive behavior.

[5] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*).

timely and nondiscriminatory manner. To be useful, the national list of UNEs must be ordered, provisioned and maintained by the ILECs in a timely and nondiscriminatory manner that promotes competitive entry and benefits consumers.

In addition to adopting a national list of performance measurements, standards and reporting requirements for the ordering, provisioning and maintenance of UNEs, XO urges the Commission to adopt and implement a corresponding self-executing enforcement plan to give meaning to the UNE performance rules, to hold the ILECs accountable for any failure to comply with their existing obligations regarding the provisioning and maintenance of UNEs and to compensate those carriers injured by the ILECs' malfeasance. Under a self-executing enforcement plan, an ILEC that fails to comply with the performance measurements and standards would make automatic payments to the Commission and to the aggrieved carrier as soon as the noncompliance occurs, without requiring further action or notice from the Commission or injured carrier. Just as UNEs are useless without a requirement for timely and nondiscriminatory ordering, provisioning and maintenance, performance measurements and standards have no value if they are not accompanied by significant penalties for noncompliance.

XO strongly discourages the Commission from conducting additional workshops to examine performance measurements and standards. The industry participants have engaged in many such workshops at the state commission level, and the results of those workshops can be synthesized in the written pleadings of this proceeding without engaging in additional workshops that would merely postpone implementation of much-needed rules and delay the growth of competition in the local telecommunications market.

With respect to the scope of the rules to be developed in this proceeding, the resultant UNE performance measurements and standards obligations should apply to the ILECs that have

control over bottleneck facilities, not competitive carriers that do not exert such control. As described more fully below, the relevant provisions of the Act relating to UNEs and other interconnection obligations were created to address ILEC control over bottleneck facilities: control that permits the ILECs to hinder the growth of competition in the local telecommunications marketplace. The same concerns do not apply to CLECs, and the procompetitive provisions of the Act should not be altered by Commission rulemaking to impose unwarranted obligations on CLECs. Moreover, strict UNE performance requirements on the ILECs will induce the CLECs to provide quality service. To the extent CLECs provide facilities on a wholesale basis, competition in the marketplace will determine which CLECs prevail.

XO urges the Commission to act quickly to adopt UNE performance measurements and standards and corresponding self-executing enforcement mechanisms with meaningful penalties and payments to injured carriers.

II. THE COMMISSION SHOULD ADOPT QUICKLY A MEANINGFUL SET OF PERFORMANCE MEASUREMENTS AND STANDARDS APPLICABLE TO THE ORDERING, PROVISIONING AND MAINTENANCE OF ILEC UNBUNDLED NETWORK ELEMENTS

The CLECs face an ongoing battle in their efforts to obtain UNE loops, multiplexing and transport from the ILECs. These issues and related examples of ILEC intransigence have been well documented before the Commission.[6] The Commission should take this opportunity to

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[6] *See*, *e.g.*, XO Communications, *Ex Parte* Presentation, CC Docket No. 96-98 (filed Aug. 24, 2001); *see also* Reply Comments of XO Communications, Inc., *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport* (filed June 25, 2001); *see also* the many comments and reply comments submitted by CLECs in the aforementioned proceeding; *see also Petition of Association for Local Telecommunications Services for Declaratory Ruling: Broadband Loop Provisioning, Deployment of Wireline Services Offering Advanced Telecommunications*

address UNE performance measurements and standards, including meaningful enforcement mechanisms, in order to ensure that ILECs meet their UNE obligations with respect to the ordering, provisioning and maintenance of UNE loops, multiplexing and transport. Appropriate disaggregation of measurements and reporting will enable the Commission to police the ILECs' anticompetitive behavior with regard to this important element.

At the same time the Commission examines the issues in this UNE performance measurements and standards proceeding, a companion docket will address performance measurements and standards in the Special Access services context.[7] The two dockets are certainly intertwined in that performance measurements and standards, as well as meaningful related enforcement plans, are needed in both the Special Access services and UNE arenas. Facilities-based CLECs, like XO, continue to remain dependent on the ILECs' "last mile" bottleneck facilities to serve end user customers. XO, like other carriers, has experienced tremendous difficulty obtaining UNE loops, multiplexing and transport.[8] Where the ILECs create roadblocks to prevent CLECs from obtaining UNE loops, multiplexing and transport, the CLECs are, in many instances, forced to resort to Special Access facilities to fulfill their loop,

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Capability, CC Docket No. 98-147; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation Transferor to SBC Communications Inc., Transferee*, CC Docket No. 98-141; *Common Carrier Bureau and Office of Engineering and Technology Announce Public Forum on Competitive Access to Next Generation Remote Terminals*, NSD-L-48 DA 00-891, May 17, 2000 (ALTS Petition); *Pleading Cycle Established for Comments on ALTS Petition for Declaratory Ruling*: *Loop Provisioning*, CC Docket Nos. 98-147, 96-98, 98-141, NSD-L-00-48, DA 00-114, 15 FCC Rcd 18671 (2000).

[7] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services,* Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC 01-339 (rel. Nov. 19, 2001).

[8] *See* XO Communications, *Ex Parte* Presentation, CC Docket No. 96-98 (filed Aug. 24, 2001) (*XO Ex Parte*) (detailing the fact that ILECs dominate the Special Access services market and use various anticompetitive tactics to prevent CLECs from obtaining UNE loops, multiplexing and transport, thereby forcing the CLECs to pay the higher costs for Special Access

multiplexing and transport needs.[9]

A. Commission Action Is Needed In Both The Instant Proceeding And The Special Access Docket To Ensure That Facilities-Based CLECs Like XO Receive Loops, Multiplexing And Transport In A Manner That Is Just, Reasonable And Nondiscriminatory

As XO has documented before the Commission, ILECs routinely reject CLECs' UNE orders for unlawful and anticompetitive reasons, thereby forcing CLECs to turn to Special Access to serve their end user customers.[10] First, under current law, ILECs are not required to combine elements that are not currently combined.[11] Those restrictions do not apply to Special Access. There is simply no other way for a CLEC to obtain a new loop-transport combination except by ordering Special Access. Yet many of the end user connections for which XO must rely upon ILEC facilities (*i.e.,* those locations that are far from the CLECs' network footprints) require interoffice transport.

Second, the ILECs contend that, under existing law, they are not required to construct new facilities for UNEs and are not required to combine new UNEs for CLECs.[12] Where CLECs

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facilities).

[9] For a detailed description and analysis of XO's position and experiences regarding UNE loops, multiplexing and transport and Special Access services, see Comments of Time Warner Telecom and XO Communications, Inc., *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321 (filed January 22, 2002).

[10] *See XO Ex Parte* ; *see also* Comments of XO Communications, Inc., *In the Matter of Application of Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347 (submitted Jan. 14, 2002) (detailing Verizon's recent policy of rejecting UNE orders due to facilities being "unavailable").

[11] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 813 (8th Cir. 2000), *cert. granted sub nom., Verizon Communications v. FCC*, 121 S. Ct. 877 (2001) (finding that Congress determined that it is the CLEC, not the ILEC, that is responsible for combining previously uncombined network elements).

[12] *See, e.g., Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for*

cannot rely on their own loop facilities, however, new construction is often needed. The Commission has, at least for now, apparently acquiesced in the ILECs' construction of their obligation (or lack thereof) to construct UNEs.[13]

Moreover, the ILECs have attempted to stretch the meaning of "new construction" in an attempt to justify rejecting UNE orders that require nothing more than the installation of a line card or other minor electronics. As XO has explained, Verizon has adopted this tactic as a means of forcing CLECs to order Special Access *in lieu* of UNEs. Not only is this practice unlawful (even under the current definition of UNEs), but it also allows Verizon to avoid application of any performance rules or penalties since no such rules and penalties apply to Special Access.[14]

Third, even if available as a legal matter, numerous practical problems with obtaining unbundled loops and loop-transport combinations remain. For example, those carriers that have gone through the process of ordering a Special Access circuit (thus establishing an "existing" combination in the ILEC network) and then attempted to convert to a loop-transport combination

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Authorization to Provide In-Region, InterLATA Services in Pennsylvania, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶ 91 n.314 (2001) (noting that Verizon argues that it is not required to construct new UNEs for CLECs where such facilities have not already been constructed for Verizon's use).

[13] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, FCC 01-361, ¶ 23 n.68 (rel. Dec. 20, 2001) (noting that the Commission has not required ILECs to construct new facilities that the ILEC has not deployed for its own use) (citing *Implementation of the Local Competition Provision of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 324 (1999)).

[14] *See* Comments of XO Communications, Inc., *Application by Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347, at 15-17 (filed Jan. 14, 2002).

have encountered seemingly endless obstacles to conversion. Specifically, as XO has explained, the ILECs are "intransigent" in implementing the Commission's EELs requirements.[15] When requesting EELs conversion, XO has experienced endless negotiations, delayed conversion requests, threats from the ILECs to impose additional charges (e.g., Special Access surcharges), and long provisioning intervals.[16] In addition to requiring CLECs to submit and process two orders for each circuit, most Special Access services are subject to early termination penalties. Many CLECs have faced "prohibitive penalties" to convert a historical base of Special Access to UNEs.[17]

Finally, the ILECs prohibit so-called commingling or mixing access services and UNEs on the same facilities to serve an end user customer. The commingling restriction denies CLECs the use of an efficient network architecture because it significantly hinders their ability to achieve reasonable economies of scale when they cannot build facilities. The commingling restriction essentially forces CLECs that want to use UNEs in conjunction with access services to instead build parallel and inefficient networks within the existing ILECs' networks.[18]

This obstructionist behavior by the ILECs results in the CLECs paying higher prices for facilities to serve their end users. It forces CLECs to set up redundant systems to install the facilities. In addition, by forcing CLECs to use Special Access instead of UNEs, the ILECs are able to avoid complying with performance measurement and standard obligations, which, if such performance rules exist at all at the state level, typically apply only to UNEs. Further, the ILECs have another incentive not to provide CLECs with UNEs: Special Access, unlike the provisioning of UNEs, is not subject to the section 271 competitive checklist. Thus, XO and

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15 *XO Ex Parte* at 10.
16 *Id*.
17 *Id*.

other CLECs are anxious for the Commission to adopt performance measurements and standards for both Special Access and UNEs. The Commission's actions in these two dockets will provide the CLECs with certainty regarding ILEC performance in ordering, provisioning and maintenance of Special Access and UNEs, whichever method of entry a CLEC may need or desire.

In addition to encountering the above-referenced ILEC intransigence in obtaining UNE loops, multiplexing and transport, the CLECs will almost certainly face additional hurdles when the ILECs predictably misinterpret the Enforcement Bureau's recent decision regarding conversion of Special Access services to enhanced extended links ("EELs"), in an attempt to impede further CLECs' attempts to obtain UNE loops, multiplexing and transport.[19]

Given the many problems that XO and other CLECs face in their efforts to obtain UNE loops, multiplexing and transport at rates, terms and conditions that are just, reasonable and nondiscriminatory,[20] it is now even more important to CLECs, and for the advancement of competition in the local telecommunications market, that the Commission move forward with its adoption of the performance measurements and standards proposed in this proceeding and in the Special Access docket, thereby ensuring that CLECs are provided with UNE loops, multiplexing and transport in a manner that is just, reasonable and nondiscriminatory, no matter which entry method the CLEC selects.

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18 *Id*. at 11.

19 *See In the Matter of Net2000 Communications Inc. v. Verizon – Washington, D.C., Inc., Verizon – Maryland, Inc., and Verizon – Virginia, Inc.*, Memorandum Opinion and Order, File No. EB-00-018, FCC 01-381 (rel. Jan. 9, 2002).

20 47 U.S.C. § 251(c)(3).

B. XO Supports A Limited List Of Performance Measurements, Standards And Reporting Requirements To Ensure That ILECs Provide CLECs With Access To Required UNEs In A Just, Reasonable And Nondiscriminatory Manner

After engaging in lengthy discussion and reaching compromise with CLECs and industry participants during the course of this and other UNE performance measurements and standards proceedings, XO has agreed to support the WorldCom Measures. The WorldCom Measures reflect the central concerns of XO and identify the limited number of measurements, standards and reporting requirements that XO believes must be adopted and enforced to ensure that ILECs provide CLECs with access to required UNEs in a just and reasonable manner, and in compliance with the Act.[21] Further, the WorldCom Measures will "enable competitors, as well as the Commission, to detect potential violations" and anticompetitive behavior on the part of the ILECs – an important aspect of performance measurements previously espoused by the Commission.[22]

The Act has been in place for nearly six years, and the list of required UNEs under the Commission's *UNE Remand Order* has been effective for over two years. It is now well past the appropriate time to develop performance measurements and standards applicable to the ordering, provisioning and maintenance of ILEC UNEs. A national list of UNE performance rules is a natural and logical companion to the Commission's list of required UNEs. A recent filing with the Commission by Covad Communications best summarizes the point: "a loop provisioned a

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21 47 U.S.C. §§ 201(b) and 251(c)(3).

22 *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-489, ¶321 (rel. Dec. 24, 1996) (*Non-Accounting Safeguards Order*); *on recon*. 12 FCC Rcd 2297 (1997); *on further recon*., Second Order on Reconsideration, FCC 97-222 (rel. June 24, 1997).

week late is no different than a loop never delivered."[23]

Implementing the standards and measurements contained in the WorldCom proposal and herein supported by XO will not, for the most part, increase the measurement and reporting burdens on the ILECs. In many instances, the ILECs are already responsible for measuring the requested information and reporting it to federal and/or state regulators.[24] Further, SBC currently faces similar measurement and reporting requirements pursuant to the Commission order approving its merger with Ameritech.[25] Moreover, as noted below, Qwest is in the final stages of developing, through a region-wide collaborative process, a region-wide performance measurement and enforcement plan.[26]

To the extent the ILECs have these measurement and reporting capabilities in place, the burden will be small or nonexistent. To the extent the proposed measurement and reporting requirements increase an ILECs' obligations and duties, such incremental costs are outweighed by the potential procompetitive benefits associated with such measurement and reporting.

It is a central tenet of the Act that the Commission can and should use its authority to

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[23] Letter from Jason Oxman, Assistant General Counsel, Covad Communications Company, to Magalie Roman Salas, Secretary, Federal Communications Commission (Oct. 1, 2001).

[24] *See Bell Atlantic/GTE Merger Order*; *see also Texas Performance Remedy Plan and Performance Measurements, Attachment 17 to Texas 271 Agreement (Version 2.0)* (Aug. 2001); *see also New York State Carrier-to-Carrier Guidelines Performance Standards and Reports*, N.Y. Pub. Serv. Comm'n Case 97-C-0139 (Jan. 2001).

As noted above, the Texas performance rules apply only to Southwestern Bell. Verizon is not required to meet those minimum UNE performance standards and measurements. The same is true for similar UNE performance rules adopted in Missouri.

[25] *See also Applications of Ameritech Corp., and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (rel. Oct. 8, 1999) (*SBC/Ameritech Merger Order*).

[26] *See* Qwest Regional Oversight Committee ("ROC") independent third-party testing of Qwest's operational support systems ("OSS") web site at the following address: http://www.nrri.ohio-state.edu/oss/oss.htm.

promote competition in the local telecommunications market and to enforce the provisions of the Act that require ILECs to provide UNEs, interconnection and collocation at "rates, terms and conditions that are just, reasonable, and nondiscriminatory."[27] Without measurements and reporting requirements, the ILECs' obligations under section 251(c) of the Act would be meaningless. The adoption of national UNE performance measurements and standards is necessary for the Commission to enforce the Act's requirements that the ILECs provide just, reasonable and nondiscriminatory access to UNEs, live up to their specific interconnection obligations, and comply with the procompetitive provisions of the Act.

The adoption of a national list of UNE performance measurements and standards is critical to promote competition and enforce the ILEC's statutory obligations. The ILECs have enjoyed the benefit of a six-year grace period, during which they have been able to run roughshod over potential competitors, to the detriment of competition and to the detriment of consumers. Without the adoption of national UNE performance measurements and standards, the overall burden on the local telecommunications market and consumers would be greater than any reporting burden placed on the ILECs. Indeed, without such obligations, the ILECs will continue to engage in anticompetitive behavior in a manner that stymies the efforts of the CLECs to compete for local telecommunications service customers.

C. The Reporting Requirements Adopted In This Proceeding Should Provide The CLECs And The Commission With Meaningful And Timely Information, In A Manner That Is Easily Accessible And Appropriately Disaggregated

It is critical that any performance measurements, standards and reporting requirements adopted in this proceeding should require the disaggregated reporting of data as detailed in the WorldCom Measures. To ensure that the Commission has useful information to enforce the

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[27] 47 U.S.C. §§ 251(c)(2), (c)(3), (c)(6).

performance rules and the Act, UNE performance reporting should be granular in a manner that reveals ILEC performance with respect to the noted UNE products, how those products are ordered, provided and maintained for both specific CLECs and CLECs in the aggregate, how those products are ordered, provided and maintained for both the ILEC and its affiliates, and how those products are ordered, provided and maintained on a specific geographic level (*e.g.*, state by state reporting, or, in some cases, reporting by competitive zones or provisioning/maintenance region).

Similar to the method of reporting required in Texas, the Commission should require that ILECs submit monthly reports, and such reports should be posted to the ILECs web site for easy access by the affected competitive carriers. To protect the confidentiality of the reported information, such web sites could be password protected. Further, the reporting should be presented and posted in a simple chart format. In addition, like the information reported under the Texas requirements, the charts should show monthly results for a twelve-month period. This information will enable the Commission and affected competitive carriers to identify trends in ILEC performance.

The performance and reporting obligations as well as the enforcement mechanism adopted in this proceeding should not disappear once an ILEC receives long distance authority under section 271 of the Act. Even after section 271 authority is granted – and perhaps more so than prior to the grant of such authority – CLECs need the protection provided under these requirements to ensure that the ILECs do not apply anticompetitive tactics to squeeze out CLECs from the local telecommunications market, leaving the CLECs with no recourse for the ILECs' intransigence. By continuing to enforce UNE performance measurements and standards after an ILEC receives long distance authority, the Commission will ensure that ILECs fulfill their

obligations under the Act.

The UNE performance measurements and standards should not expire upon some date certain. The Commission and the industry participants cannot predict what will be the state of the local telecommunications market in six months or six years. Accordingly, the performance rules adopted in this proceeding should be reviewed on a periodic basis. On the one hand, at some point in the future, some measures may prove to be unnecessary. On the other hand, new measures may become warranted. Furthermore, upon further review of the rules and ILEC behavior, the Commission may determine that stricter measurements, standards and penalties are required to enforce the Act. For example, several of the WorldCom Measures are diagnostic and, thus, do not currently impose penalties (*e.g.*, Percent Missed Due Dates Due to Lack of Facilities under Measure 14, Percent Orders Completed on Time). Due to the potential impact on CLEC customers, if it is determined that the ILECs are failing to meet such measures on a regular basis, then the Commission should find that such measures should no longer be diagnostic but rather should be categorized as remedy-eligible measurements. Thus, the performance rules and reporting requirements should continue to be reviewed, updated and modified.

III. THE FEDERAL RULES SHOULD SERVE AS A FLOOR, PERMITTING THE STATES TO ADOPT MORE STRINGENT REQUIREMENTS, CONSISTENT WITH THE FEDERAL RULES AND THE ACT

As the Commission notes in its NPRM, some states have adopted, or are in the process of adopting, UNE performance measurements and standards similar to those proposed by the Commission.[28] The Texas Public Utility Commission, for example, implemented a performance

[28] *NPRM* ¶15.

and remedy plan pursuant to the Texas 271 Agreement.[29] Similarly, the state commissions in Missouri, Oklahoma, Kansas and Arkansas have adopted performance and remedy plans for Southwestern Bell pursuant to their reviews of Southwestern Bell's section 271 applications in those states.[30] Further, the New York Public Service Commission developed and adopted a similar performance and enforcement plan with respect to wholesale or carrier-to-carrier services.[31] In another proceeding designed to examine ILEC performance measurements and standards, 13 of the 14 states in the Qwest region have been conducting a collaborative process to test the functionality and capabilities of the systems and process provided by Qwest to its competitors.[32] The work of the states has not been in vain. To the contrary, the parties to this proceeding have worked together at the state level to grapple with these important issues and come up with mutually acceptable lists of measurements and standards.

State regulators appear to endorse the shared role between the states and the Commission in the development and enforcement of national guidelines regarding the ordering, provisioning and maintenance of UNEs. In a recent resolution concerning national performance standards, the National Association of Regulatory Utility Commissioners ("NARUC") stated that it encourages the Commission "to create a mechanism, which allows the [Commission] and State regulatory

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[29] *See Texas Performance Remedy Plan and Performance Measurements, Attachment 17 to Texas 271 Agreement (Version 2.0)* (Aug. 2001).

[30] *Missouri Performance Remedy Plan and Performance Measurements, Attachment 17 to Missouri 271 Agreement (M2A)*, Docket TO-99-227 (Mar. 2001); *Oklahoma Performance Remedy Plan and Performance Measurements, Attachment 17 to Oklahoma 271 Agreement (O2A)*, Docket 990000-560 (Oct. 2000); *Kansas Performance Remedy Plan and Performance Measurements, Attachment 17 to Kansas 271 Agreement (K2A)*, Docket 97-SWBT-411-6IT (Oct. 2000); *Arkansas Performance Remedy Plan and Performance Measurements, Attachment 17 to Arkansas 271 Agreement (A2A)* (Oct. 2001).

[31] *See New York State Carrier-to-Carrier Guidelines Performance Standards and Reports*, N.Y. Pub. Serv. Comm'n Case 97-C-0139 (Jan. 2001).

[32] The ROC has been testing Qwest's OSS since early 2000, and an additional committee comprised of CLECs, Qwest and other industry participants, including 11 of the 14 states in the

authorities to work together to develop minimum base guidelines that will provide the minimum information needed for effective [Commission] and State enforcement efforts."[33]

The Commission's adoption and implementation of national performance measurements and standards with respect to the ILECs' ordering, provisioning and maintenance of UNEs will not undo the work performed previously by the state commissions. The development of national measurements and standards merely builds on the vast experience and information garnered through the work performed at the state level.

IV. THE COMMISSION HAS LEGAL AUTHORITY TO DEVELOP AND IMPLEMENT A NATIONAL SET OF PERFORMANCE MEASUREMENTS, STANDARDS AND REPORTING REQUIREMENTS

For the same reasons that the Commission has legal authority to develop and implement a national list of required UNEs, the Commission has legal authority to develop a national set of performance measurements and standards with respect to the ordering, provisioning and maintenance of those UNEs. In its *UNE Remand Order*, the Commission explained correctly that, pursuant to section 251(d) of the Act, it has legal authority to develop the rules regarding UNEs.[34] Further, the Commission noted that the states, pursuant to section 251(d)(3) of the Act, remain free to create additional UNEs and to propose and implement measures beyond those created by the Commission, so long as the state's efforts are consistent with the Commission's orders and the Act.[35]

The Commission, as it notes in the NPRM, has rulemaking authority granted under

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Qwest region, has been established to develop a post-271 performance plan.

[33] *See* "NARUC Resolution on National Performance Standards," (adopted in Convention, Nov. 14, 2001).

[34] *UNE Remand Order* ¶¶121-123, 148-152.

[35] *UNE Remand Order* ¶¶153-161.

section 201(b) of the Act to implement the provisions of the Act, including sections 251 and 252.[36] Just as section 251(d) provides the Commission with the authority to create a national list of required UNEs, section 251(d) provides the Commission with the authority to create a list of performance measurements and standards that give meaning to the list of UNEs. In addition, the Commission has general rulemaking authority under the Act to enforce section 251(c) and ensure that the ILECs comply with their obligations to provide interconnection and unbundling in a manner that is just, reasonable and nondiscriminatory.[37] Indeed, the Commission relied on similar statutory authority to establish provisioning standards for collocation based on the ILECs' statutory "duty to provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation…."[38]

The Commission also has the authority to require that ILECs include commitments to report on their performance. Specifically, under Section 4(i) of the Communications Act, the FCC has the authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Performance reports are "necessary" to ensure that the ILECs are complying with the performance measurements and standards described above because only the ILECs have information on the level of service provided to their end users, affiliates, and competitors.

The Commission's creation of a national list of performance measurements, standards

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36 *NPRM* at ¶14.

37 47 U.S.C. § 201(b).

38 47 U.S.C. § 251(c)(6); *see Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking; Fifth Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806, ¶17 (2000).

and corresponding reporting requirements will provide much needed certainty with respect to ILECs' ordering, provisioning and maintenance of UNEs. Moreover, a national list creates a starting point for state commission to use and reduces the need for CLECs to invest redundant time and other valuable resources in additional state-by-state proceedings to discuss, adopt and implement similar baseline measures and standards. States can begin with the national measures and add additional measures as needed. Similar to the states' authority to expand the Commission's national list of required UNEs, states would be free to expand the list of performance measurements and standards and related penalties, so long as such efforts are consistent with the Commission's rules and the Act, as detailed in section 251(d)(3) of the Act.[39]

Ultimately, a national list of UNEs, coupled with a corresponding set of performance measurements and standards and related self-executing enforcement mechanism, benefits consumers by increasing the growth of competition in the telecommunications market.

V. THE COMMISSION SHOULD ADOPT A MEANINGFUL, SELF-EXECUTING ENFORCEMENT MECHANISM WITH APPROPRIATE PENALTIES AND REMEDIES THAT PROVIDE ADEQUATE COMPENSATION TO INJURED CLECS

In this proceeding, the Commission should not simply stop at adopting a national list of UNE performance measurements and standards. At the same time it develops such UNE performance rules, the Commission must also adopt the logical and necessary complement to UNE performance measurements and standards: a meaningful and self-executing enforcement mechanism.

To be most effective and meaningful, the enforcement mechanism adopted by the Commission should be a self-executing plan with significant penalties and damages. Under the

[39] 47 U.S.C. § 251(d)(3).

self-executing plan, ILECs that fail to comply with the UNE performance rules would make automatic payments to the Commission. This type of enforcement plan finds its genesis in similar plans implemented by the Commission in previous proceedings.[40]

Just as the Commission noted in the *SBC-Ameritech Merger Order*, the self-executing enforcement plan adopted in the instant proceeding should "in no way supersede or replace the Commission's enforcement and investigative powers."[41] The Commission would remain free to "impos[e] fine and forfeitures, issu[e] cease-and-desist order, modify[] conditions as needed, award[] damages, and requir[e] appropriate remedial action."[42]

While the Commission should continue to exercise its authority under the Act to issue Notices of Apparent Liability ("NAL") and impose penalties on violating carriers payable to the United States Treasury, the Commission should also create a second penalty tier that requires payment to the parties injured by ILEC intransigence: the CLECs.[43] A bipartisan group of federal lawmakers just recently submitted comments in this proceeding advocating the same principle. Noting that the ILECs have not appeared to take seriously their unbundling obligations under the Act, the lawmakers stated that "[o]nly through self-executing penalties that inure directly to the benefit of the aggrieved carrier will the ILECs have sufficient incentive to comply with their legal obligations."[44]

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40 *See Bell Atlantic/GTE Merger Order*; *see also SBC/Ameritech Merger Order; see also Application by SBC Communications, Inc. to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶¶423-427 (2000); *see also Application by Bell Atlantic New York for Authorization to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶¶433-443 (1999), *aff'd sub nom*., AT&T v. FCC, 220 F.3d 607 (D.C. Cir. 2000).

41 *SBC/Ameritech Merger Order* ¶415.

42 *Id*. (citing such authority under 47 U.S.C. §§ 503, 316, 416(b) and 209).

43 47 U.S.C. § 503(b); 47 CFR 1.80(a).

44 Letter from Rep. Steve Largent, Rep. Bart Stupak, Rep. Chris Cannon, Rep. Karen McCarthy, Rep. Anna Eshoo and Rep. Joe Pitts to Hon. Michael Powell, Chairman, Federal Communications Commission (Jan. 16, 2002).

As an alternative remedy to CLECs under the enforcement plan, the Commission could adopt, as an element of the plan, the ability for a CLEC to receive a waiver of charges from the offending ILEC equal to, and in lieu of, the amount of the cash payment required under the self-executing plan. The Commission has previous experience implementing and overseeing such enforcement plans.

Clearly, the Commission has legal authority to impose performance conditions and discounts or payments for ILEC noncompliance with such performance conditions. For example, in previous proceedings, the Commission has imposed performance conditions on ILECs and required the ILECs to meet certain pricing requirements and discount structures for unbundled loops and other services.[45]

Although the Commission clearly has the authority to implement penalties, including discounts and waiver of fees, for noncompliance, it faces certain constraints with regard to the maximum fines it may impose upon ILECs and its ability to award CLECs attorneys fees and litigation costs. Chairman Powell recognized in a recent speech at the conference of the Association for Local Telecommunications Services ("ALTS"), the Commission has been armed with inadequate tools to enforce its rules as they apply to ILEC compliance with Commission standards. "The level of fines we could impose in many cases was paltry. For many large carriers the penalties could be absorbed as the cost of doing business. Moreover, pursuing an enforcement action often drains the resources (both of time and money) of a small competitor,

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[45] *See, e.g., In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14, 1997) ¶¶180-191 (*BA/NYNEX Merger Order*); *see also Bell Atlantic/GTE Merger Order* ¶¶248-348 and *SBC/Ameritech Merger Order* ¶¶354-418 (requiring, for example, line sharing discounts, resale discounts, and unbundled loop discounts).

yet the statute affords no compensation for its losses or expenses."[46]

As noted by Chairman Powell, the ILECs have simply absorbed fines and penalties as a cost of doing business and the price paid for eliminating competitors. For example, immediately prior to the comment deadline in this proceeding, the Commission issued an NAL against SBC Communications, Inc. ("SBC"), seeking to impose a $6 million forfeiture against SBC for willfully and repeatedly violating a merger condition that requires SBC to offer the shared transport UNE in the former Ameritech states "under terms and conditions substantially similar to those it offered in Texas as of August 27, 1999."[47] Based on SBC's 2000 Annual Report, the proposed penalty represents only 1/100th of a percent (0.01%) of SBC's total revenue for 2000, which was slightly greater than $53.3 billion.[48]

In his remarks, Chairman Powell explained further that the Commission has called upon Congress to increase the forfeiture amount allowed under the statute and to allow successful litigants to receive compensatory damages and associated litigation expenses.[49] XO supports any effort to expand both the penalties that can be levied against violating carriers and the enforcement tools available for compelling ILECs' compliance with their obligations under the Act. In addition, XO supports any legislative effort to enable the Commission to afford CLECs with more appropriate remedies, including the authority to award prevailing parties with litigation costs and attorney fees.

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46 *See* "Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Association for Local Telecommunications Services, Crystal City, Virginia, November 30, 2001," (remarks as prepared for delivery) (*Chairman Powell ALTS Remarks*) (text available via the Commission's web site, http://www.fcc.gov/Speeches/Powell/2001/spmkp111.html).

47 *See In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030, NAL/Acct. No. 20023200004, FRN 0004-3051-24, 0004-3335-71, 0005-1937-01, FCC 02-7 (rel. Jan. 18, 2002).

48 SBC 2000 Annual report is available via SBC's web site at the following: http://www.sbc.com/Investor/Financial/annualreport/2000_AR_FINAL.pdf .

With respect to the self-executing enforcement plan adopted in this proceeding, CLECs must not be foreclosed from pursuing all remedies that provide them with just compensation for the harm inflicted by ILEC malfeasance. In the case of ensuring the timely ordering, provisioning or maintenance of UNEs, any enforcement mechanism adopted by the Commission or the states should not preclude CLECs from bringing additional actions under the Act – such as section 208 complaints and similar state commission complaint actions – or pursuing other remedies under federal or state law in the appropriate fora.

With respect to the exclusions permitted by the Commission and the level of statistical forgiveness allowed to the ILECs, the Commission should not weaken its enforcement efforts by allowing ILECs the opportunity to interpret and apply statistics in a manner that avoids liability for noncompliance with the adopted performance measurements and standards. A small amount of statistical forgiveness is acceptable, but the level of forgiveness should not gut the effectiveness of the rules and enforcement plan, thereby providing the ILECs with the incentive to game the reporting process to avoid complying with their obligations under the Act and the Commission's regulations.[50]

VI. THE COMMISSION SHOULD NOT SPEND TIME CONDUCTING ADDITIONAL WORKSHOPS ON THESE ISSUES

As noted above, several states – *e.g.*, New York, Texas, and the 14 states in the Qwest region under the ROC OSS proceeding – have engaged in a tremendous amount of work holding workshops to develop UNE performance measurements and standards. Indeed, many of the

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49 *Id.*

50 While the instant comments do not contain a detailed proposal regarding the self-executing enforcement plan and associated penalties, XO intends to expand on its proposal with written comments. As noted below, XO strongly opposes additional workshops.

performance measurements, standards and associated enforcement plans and penalties proposed and supported by XO and the other CLECs participating in this docket are based on the valuable lessons learned as a result of those extensive workshops. Where the states have conducted UNE performance workshops, the ILECs and CLECs have worked together with the state commissions to develop the measurements. The parties to those state proceedings have invested time and other valuable resources to address UNE ordering, provisioning and maintenance rules. Accordingly, at this time, CLECs need a list of required minimum performance measurements and standards and accompanying enforcement mechanism, not additional workshops at either the federal or state level.

As Chairman Powell stated in recent remarks, it is important for the Commission to act quickly in this new phase of promoting competition, in order to "driv[e] out uncertainty" in the local telecommunications marketplace.[51] In addition, Chairman Powell stated that "network elements must be provisioned in a timely manner to be useful."[52] Thus, it is time for Commission action. To delay the adoption and implementation of UNE performance measurements and standards by holding additional workshops at the federal or state levels would simply serve to hinder the growth of competition by allowing ILECs additional time to stymie CLEC efforts to obtain UNEs as required under the Act the implementing rules already developed by the Commission.

VII. THE MEASUREMENTS AND STANDARDS DEVELOPED IN THIS PROCEEDING SHOULD APPLY TO ILECS ONLY

In its NPRM, the Commission asks parties to comment on whether the rules developed in

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51 *Chairman Powell ALTS Remarks*.

52 *Id*.

this docket should apply to all ILECs and whether such rules should apply to other carriers, including CLECs, that provide facilities on a wholesale basis.[53] In response to that line of inquiry, XO believes that the UNE performance rules adopted and implemented in this docket should apply to ILECs only.

As the Commission notes in its NPRM, "the Act is premised on the notion that federal and state regulators can and should promote competition by requiring incumbent LECs to provide inputs to other LECs so that the latter may compete with the incumbent for customers."[54] The bottleneck facilities, which the Act was created to address, are in the hands of the ILECs. CLECs, even if they were to provide facilities on a wholesale basis, do not have the same abilities to hamper competition by controlling bottleneck facilities. Accordingly, CLECs, to the extent they might provide facilities to other carriers on a wholesale basis, should not be held to the rules implementing an Act that was designed to address concerns regarding ILEC control of essential facilities. Beyond the bottleneck facilities controlled by the ILECs, the marketplace should decide which competitors prevail. CLECs' retail and wholesale customers are free to switch carriers; however, wholesale customers of the ILECs do not have that luxury.

The Act imposes specific obligations regarding the elements at issue in this proceeding: interconnection and access to UNEs.[55] Those duties, however, are imposed specifically on the ILECs. The Commission should not use its general rulemaking authority under section 201(b) of the Act to expand to other carriers the congressionally-mandated, ILEC-specific obligations. The interconnection obligations that apply to other carriers are set forth in section 251(b) of the

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53 *See NPRM* ¶¶23, 24.

54 *Id*. ¶2.

55 47 U.S.C. §251(c)(2)-(3).

Act.[56] No provision in the Act contemplates expanding obligations imposed on ILECs – duties imposed to address ILEC control of essential bottleneck facilities – to other carriers. Further, to expand performance measurement and reporting obligations to CLECs would impose additional and unnecessary costs and burdens on CLECs.

Given that the ILECs are the dominant providers of facilities, CLECs simply lack the incentive or opportunity to discriminate in the provision of facilities. Any customer that might receive such discriminatory service from a CLEC would simply switch to the ILEC, the ubiquitous provider. This eliminates the need for imposing performance rules on CLECs. Finally, in light of the overwhelming ILEC dominance in this market, the costs imposed on new entrants by new performance rules clearly outweigh any potential incremental benefits associated with collection of such data.

[56] 47 U.S.C. § 251(b).

VIII. CONCLUSION

For the reasons described herein, XO respectfully requests that the Commission act quickly to adopt performance measurements and standards and a meaningful, self-executing enforcement mechanism, with substantial penalties for noncompliance, with regard to the ordering, provisioning and maintenance of ILEC UNEs.

Respectfully submitted,

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